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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966.

No. 994

RUSSELL W. BORROWDALE,
*Petitioner,*

*vs.*

HOWARD R. REULAND,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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### STATUTES INVOLVED.

Section 401 of the Criminal Code, 62 Stat. 701, 18 U. S. C. 3214 (1958 ed.) provided as of the dates involved in this case:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the adminstration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Petitioner fails to mention that Rules 9 and 10 of the Rules of Practice in Admiralty and Maritime Cases were rescinded, effective July 1, 1966, by order of this Honorable Court, dated February 28, 1966, as part of the unification of Civil and Admiralty proceedings.

## STATEMENT OF CASE.

The Petitioner seeks review of an order adjudging him guilty of civil contempt.

In addition to the facts of the case as stated by Petitioner (P. Br. pp. 3-7), the following facts should be noted:

1. Petitioner, Russell W. Borrowdale, was custodian of the vessel Happy Pappy and her *appurtenances* for the period from July 10, 1964, when the vessel, her engines, boilers, machinery, tackle, apparel and furniture, were seized by the U. S. Marshal (R. A. 8), until September 29, 1965, when the District Court, after hearing evidence on the issues of ownership and the right to possession of the Happy Pappy, entered findings of fact, conclusions of law, and a decree and order, declaring Howard Reuland the lawful owner and entitled to possession of the vessel and her appurtenances (B. A. 11; R. A. 46-48).

Russell Borrowdale had been appointed the custodian of the Happy Pappy by virtue of two orders entered in the District Court pursuant to the stipulation of the parties (R. A. 13-14, 19-20). The first stipulated order expressly provided that Borrowdale was to be custodian not only of the Happy Pappy, but also of her "engines, tackle, apparel, fixtures and furniture," and that technical custody of the vessel was to remain with the U. S. Marshal (R. A. 13-14). The order further provided that the Marshal might at any time during the litigation below "retake and resume possession of said boat at his own initiative, on the written

request of either of the parties, or upon order of the above-entitled Court" (R. A. 13-14).

2. On September 30, 1965, the day after the Court had declared Howard Reuland to be the lawful owner and entitled to possession, Russell Borrowdale delivered possession to Mr. Reuland. Upon inspecting the vessel, Mr. Reuland discovered that numerous pieces of equipment were missing, including a 13-foot Boston Whaler, brackets for same and 2 fish-fighting chairs (R. A. 48-49). These items had been aboard when Russell Borrowdale obtained possession of the vessel in 1963 in Mexico (R. A. 61); they were aboard when Mr. Borrowdale brought the vessel from Mexico to Chicago (B. A. 61); and, although there was a conflict in his testimony, Mr. Borrowdale, on one occasion in the proceedings below, admitted that the objects in question had been aboard the Happy Pappy when seized by the Marshal (R. A. 61).

3. On October 1, 1965, the day after discovering that the equipment was missing, Howard Reuland moved for an order directing Russell Borrowdale to show cause why he should not be held in contempt for his removal of the Boston Whaler, brackets and fish-fighting chairs. Subsequently, a second rule to show cause was entered against Mr. Borrowdale as a result of his leading the United States Marshal to believe that Borrowdale, not Reuland, had been declared the owner of the vessel, thus causing the Marshal to arrest Mr. Reuland and remove him from the vessel. A hearing on these rules to show cause was held on October 8, 1965.

4. After testimony was presented at the October 8th hearing, the Court recessed to permit a conference between the proctors for Mr. Reuland and Mr. Borrowdale. Following this recess, the then proctor for Mr. Borrowdale, William K. Johnson, stated to the Court that the par-

ties had reached an agreement which would resolve the contempt matter (B. A. 59). Mr. Johnson stated to the Court that the Boston Whaler, brackets and fishing gear would be turned over to Mr. Reuland, and Mr. Borrowdale would be allowed to assert a lien against the vessel for the value of these items, in addition to certain other liens he had previously claimed against the vessel (B. A. 59-60). Mr. Johnson stated this agreement would be incorporated in an order to be presented to the Court (B. A. 59). After the proctors for Claimant Reuland stated that this arrangement was satisfactory to them, the District Court Judge, the Honorable Bernard M. Decker, discharged the rules to show cause (B. A. 60).

5. As admitted by Claimant Borrowdale, an order incorporating the agreement of October 8, 1965 was never presented. Numerous efforts followed, not material here, to induce Mr. Borrowdale to deliver the Boston Whaler, brackets and fish-fighting chairs, without the necessity of obtaining additional court orders (B. A. 22-24; R. A. 99-101). Finally, when these efforts proved unsuccessful, on November 9, 1965, the proctors for Claimant Reuland again appeared before Judge Decker (R. A. 79) and obtained an order directing the United States Marshal to obtain possession of this equipment from Mr. Borrowdale, and to deliver it to Mr. Reuland (B. A. 25). Mr. Borrowdale's proctor, William K. Johnson, also appeared on that date and stated that there was no objection to the entry of the order (R. A. 79). The order of that day, November 9, 1965, specifically stated the Boston Whaler, brackets and fish-fighting chairs were in the custody of the Court.

6. Thereafter, a particularly frustrating period began for the proctors for Claimant Reuland in their efforts to recover the property in question. They experienced considerable difficulty in locating and serving Mr. Borrowdale with a copy of the Court's order, and the directive

from the Marshal, commanding Mr. Borrowdale to deliver the property. These efforts are detailed in Appellee's Appendix below (R. A. 25-29; R. A. 91-97, 99-101). Finally, on November 18, 1965, one of the proctors for Claimant Reuland, Jonathan G. Bunge, a Deputy U. S. Marshal, Arthur Wilson, an agent for Howard Reuland, William Fournier, and a truck driver, Harry Schwartz, went to the R. W. Borrowdale Company at 250 West 83rd Street in Chicago to obtain the property (R. A. 27-94). Mr. Bunge and the truck driver arrived first and spoke with Mr. Borrowdale, explaining the purpose of their visit (R. A. 27-94). Mr. Borrowdale replied (R. A. 27-94):

> "I am the boss of this law suit and things are going to be done different from here on out."

Mr. Borrowdale insisted that an additional bond be posted or he would not deliver the property. Subsequently, the Deputy Marshal arrived. The Deputy Marshal attempted to proceed with the service of a copy of the directive and the order of November 9, 1965, but he was interrupted by Mr. Borrowdale who stated that he would not deliver the property until an additional bond was posted (R. A. 23, 95-96). Mr. Borrowdale then turned to leave; however, the Deputy Marshal stopped Mr. Borrowdale and showed him copies of the Court's order and the directive (R. A. 28, 96), and then handed copies of these documents to Mr. Borrowdale (R. A. 28, 96). The Deputy Marshal asked Mr. Borrowdale to deliver to Mr. Fournier, as Mr. Reuland's agent, the fish-fighting chairs, Boston Whaler, and brackets (R. A. 28, 96). Mr. Borrowdale declined (R. A. 28, 96). The Deputy Marshal asked Mr. Borrowdale (R. A. 28, 96):

> "Are you refusing to delivery this property?"

Mr. Borrowdale replied (R. A. 28, 96):

> "Yes."

Mr. Borrowdale turned to Mr. Bunge (Mr. Reuland's proctor) and stated that he was worth $4,000,000, that Mr. Bunge was not, and that he knew more about the legal status of this matter than did Mr. Bunge (R. A. 28-29). After this statement Mr. Bunge, Deputy Marshal Wilson and Messrs. Fournier and Schwartz left the Borrowdale plant (R. A. 29).

7. The following day, November 19, 1965, the third and last petition for an order to show cause was presented to Judge Decker (B. A. 26-28; R. A. 80-82). After a delay of several weeks, caused by Mr. Borrowdale changing counsel and later his contracting intestinal flu, a hearing was held on December 10, 1965. At the December 10th hearing, the only conflict in the testimony related to whether there had been an agreement to post an additional bond with respect to the Boston Whaler, brackets and fish-fighting chairs. Athough there was some difference in their testimony, Russell Borrowdale and an employee of his company, Benjamin F. Pfeifer, testified that on October 8, 1965, the same date on which Mr. Johnson had represented to the Court that his client would turn over the equipment to Mr. Reuland, there had been an "agreement" about which the Court had not been advised by Mr. Johnson or anyone else (B. A. 62-74). This "agreement," said Mr. Borrowdale, was made directly with him and required Mr. Reuland to post an additional bond of $3,000 before obtaining possession of the Boston Whaler, brackets and fish-fighting chairs (B. A. 74). Mr. Borrowdale testified that he had not turned over the property because the "agreement" had not been honored.

Following this testimony, one of Mr. Reuland's proctors, Edward S. Silber, stated, as an officer of the Court, that no agreement of any kind had been made directly with Mr. Borrowdale on October 8, 1965, and further that he and Mr. Bunge had refused even to confer with Mr. Bor-

rowdale on that date because they believed that any settlement would be impossible if Mr. Borrowdale were included in the settlement discussions (R. A. 97). Mr. Bunge also testified under oath that there had not been any such agreement and that he had never heard of a request for an additional bond until he went to the Borrowdale plant on November 19, 1965 (R. A. 99-101).

Mr. Borrowdale admitted that service of the Court's order and Marshal's directive had been made upon him as stated above, and that he had refused to obey the order. His only claimed justification for not obeying the order was the failure to provide the alleged bond.

Following the conclusion of testimony on December 10, 1965, Judge Decker stated to Mr. Gordon, Mr. Borrowdale's new counsel (R. A. 102):

> "But what bothers me about your client is that having, in effect, defied the order of the Court and defied the Marshal, and in effect, taking the law into his own hands, I have also reached the conclusion that in making the statement that he has made here from the witness stand, that he committed perjury as well."

Subsequently, the Court ordered Mr. Borrowdale to deliver the 13-foot Boston Whaler, brackets and 2 fish-fighting chairs within five (5) days, ordered him to pay a fine of $2,500.00 to Howard Reuland as compensation for his loss, expenses and damages, and further ordered that, if Russell Borrowdale failed to deliver the property and pay the fine within five (5) days, he would be imprisoned until he complied with the Court's order.

## ARGUMENT.

### A. THIS IS A SIMPLE CASE OF CIVIL CONTEMPT WITH NO SIGNIFICANT LEGAL OR FACTUAL QUESTIONS.

The significant facts for the purposes of this appeal are not contested or even questioned. Russell W. Borrowdale continually refused to comply with and resisted the enforcement of orders entered by the Honorable Bernard M. Decker, Judge of the United States District Court for the Northern District of Illinois. This defiance of Judge Decker was not an isolated, unknowing or inadvertent occurrence; it was intentional, deliberate and willful, and part of a conscious and continued scheme to thwart the Court's decree. *United States* v. *Schine,* 260 F. 2d 552 (2d Cir., 1959).

On September 29, 1965, Judge Decker ruled Howard Reuland was the owner and entitled to possession of Happy Pappy, including her appurtenances (B. A. 11). By seizure and stipulation of the parties, these items were in the constructive custody of the Court. Mr. Borrowdale stipulated that he would hold the property for the benefit of all parties to the action. This stipulation also provided that the Marshal could retake possession at any time upon order of Court (R. A. 13-14). On October 8, Mr. Borrowdale's proctor, in Borrowdale's presence, stated to the Court that Mr. Borrowdale would deliver the property to Mr. Reuland. Finally, on November 9, 1965, in the presence of Mr. Borrowdale's proctor who voiced no objection, Judge Decker ruled that the Boston Whaler, brackets and fish-fighting chairs were to be delivered to Mr. Reuland (B. A. 25). Nevertheless, on November 18, 1965, despite all of the foregoing, when confronted by a Deputy Marshal and di-

rected to deliver these items, Mr. Borrowdale refused (B. A. 70; R. A. 28, 96).

Section 401 of Title 18 of the United States Code provides that a Court of the United States has the power to punish by fine or imprisonment any contempt of its authority, including:

> "Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

It is well established that an order issued by a Court with jurisdiction over the subject matter and persons must be obeyed by the parties, even though the persons affected may believe the order to be improper. *United States* v. *United Mine Workers of America,* 330 U. S. 258 (1947); *Howat* v. *Kansas,* 258 U. S. 181 (1922); *Nelson* v. *Steiner,* 279 F. 2d 306 (7th Cir., 1960); *United States* v. *Schine,* 260 F. 2d 552 (2nd Cir., 1959); *National Labor Relations Board* v. *American Manufacturing Co.,* 132 F. 2d 740 (5th Cir., 1943).

Russell Borrowdale's behavior constituted contempt because it was disobedience of and resistance to Judge Decker's orders; it was contempt because it constituted interference with property in the custody of the Court, *Denver-Greeley Valley Water Users Ass'n.* v. *McNeil,* 131 F. 2d 67 (10th Cir., 1942); it was contempt because it was resistence to a lawful writ or process of the Court. *Raymor Ballroom Co.* v. *Buck,* 110 F. 2d 207 (1st Cir., 1940).

## B. THE ARGUMENTS RAISED BY PETITIONER FURNISH NO BASIS FOR GRANTING THE EXTRAORDINARY RELIEF HERE REQUESTED.

### I.

Petitioner's argument based on former Rule 9 of the Rules of Practice in Admiralty and Maritime Cases is clearly fallacious and provides no basis for a grant of certiorari. Petitioner argues there was not compliance with Rule 9 because the trial court failed to hold a hearing before entering the order of November 9, 1965. However, Rule 9 only established a procedure by which a court could obtain custody of items not previously in custody. The rule had no application in a case where, as here, the items in question were already in the custody of the District Court by virtue of the seizure of the vessel by the Marshal and the stipulation and agreement of the parties. Moreover, as the record clearly shows, any real or imagined need for a hearing became unnecessary when counsel for Claimant Borrowdale appeared on November 9, 1965, and allowed the entry of the delivery order without objection.

Furthermore, Admiralty Rule 9 was rescinded effective July 1, 1966, and supplanted by the new unified civil and admiralty procedures. Admiralty Rule 9 has been incorporated into new Rule C(5) entitled: "Ancillary Process." A comparison of old Rule 9 and new Rule C(5) shows that the language of the old rule has been drastically altered and that there would be no value in construing old Rule 9 as a guide for cases involving new Rule C(5).

### II.

Petitioner's argument regarding Rule 10 is unclear. The Court of Appeals did not address itself to the question of whether or note Rule 10 had been complied with; this was

because a discussion of this question was completely unnecessary to dispose of the appeal. The Court specifically stated that it was not necessary to resolve such questions because all necessary jurisdiction over the res was conferred by the waiver and consent implicit in Borrowdale's agreement in open court to deliver these articles to Mr. Reuland and his further agreement that an order directing delivery might be entered. That jurisdiction over a res can be provided by stipulation and waiver is well-established. *Reed* v. *Steamship Yaka,* 307 F. 2d 203, 204-205 (3rd Cir., 1962), rev'd on other grounds, 373 U. S. 410 (1963).

Moreover, like Rule 9, Rule 10 has now been rescinded; it has been supplanted by sub-sections (3) and (4) of new Rule C. The language of the new rule is radically different from that of the old and a construction of the old rule would be of no assistance in future cases.

## III.

To support his third argument Petitioner quotes out of context an isolated statement made in *J. K. Welding Co., Inc.* v. *Gotham Marine Corporation,* 47 F. 2d 332 (S. D. N. Y., 1931). A reading of the entire decision reveals the Court's position to have been merely that when an action is brought *in rem,* the Court cannot enter a final decree *in personam* against the claimant of the vessel, because no relief was sought against the claimant. This is quite different from a holding, as Petitioner intimates, that the same court has no contempt power over a claimant or custodian of a vessel. Thus, there is no conflict between the Court of Appeals for the Seventh Circuit and the District Court for the Southern District of New York. Although Petitioner maintains there are other, *unnamed* conflicts between the Court of Appeals for the Seventh Circuit and this Hon-

orable Court, a diligent search fails to reveal any such conflicts.

Petitioner's argument is not only without support in the authorities, but contrary to good sense. If Petitioner's argument were adopted, a court which entrusted property to a custodian would be powerless to use its contempt powers to punish or otherwise reprimand such custodian if he absconded with such property, destroyed it or committed other wrongful acts. Merely to state such a dubious proposition demonstrates its fallacy.

## IV.

Petitioner's final argument deals entirely with factual matters, i.e. whether the burden of proof was sustained and whether the findings were supported by clear and convincing evidence. On these matters the Court of Appeals accurately stated (P. Br. p. 20):

> "The record overwhelmingly evidences an intentional, deliberate, willful and contumacious defiance of the Court's order, and a contemptuous disrespect for orderly execution of judicial process."

It is well-established that this Honorable Court does not grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U. S. 220, 227 (1925). This is particularly true where, as here, the evidence has already been reviewed by a court of appeals. *Graver Manufacturing Co.* v. *Linde Co.,* 336 U. S. 271, 275 (1949) and cases there cited.

## CONCLUSION.

For the reasons stated it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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